

1 Ali M.M. Mojdehi, State Bar No. 123846  
Janet D. Gertz, State Bar No. 231172  
2 **BAKER & McKENZIE LLP**  
12544 High Bluff Drive, Third Floor  
3 San Diego, CA 92130-3051  
Telephone: +1 858-523-6200

4 Attorneys for Plaintiff  
5 KISMET ACQUISITION, LLC

**FILED**  
**08 AUG -8 PM 12: 01**  
CLERK, U.S. DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA  
*me*  
DEPUTY

6  
7  
8 UNITED STATES BANKRUPTCY COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA

10  
11 In re  
12 JERRY LEE ICENHOWER dba Seaview  
13 Properties, and DONNA LEE ICENHOWER,  
14 Debtors.

15 KISMET ACQUISITION, LLC,  
16 Plaintiff,

17 v.

18 JERRY L. ICENHOWER an individual; et al.  
19 Defendants.  
20

**'08 CV 1446 BTM BLM**

Case No. 03-11155-LA-7

Chapter Number 7

Adv. Proc. No: 04-90392  
Adv. Proc. No. 06-90369

**ELECTION BY APPELLEE KISMET  
ACQUISITION, LLC, TO HAVE  
APPEAL HEARD BY DISTRICT  
COURT**

DATE: N/A  
TIME N/A  
DEPT: 2  
JUDGE: Hon. Louise DeCarl Adler

21 Plaintiff and Appellee, Kismet Acquisition LLC ("Kismet"), respectfully elects pursuant to  
22 28 U.S.C. §158(c)(1)(B) to have the Diaz Defendants' appeal taken from the Amended Consolidated  
23 Judgment entered July 30, 2008 in the above adversary proceedings heard by the United States  
24 District Court, Southern District of California.

25 ///

26 ///

27 ///

28 ///

1 Respectfully submitted,

2  
3 Dated: August 7, 2008

BAKER & McKENZIE LLP

4  
5 By: /s/ Ali M.M. Mojdehi

Ali M.M. Mojdehi

Janet D. Gertz

6  
7 Attorneys for Plaintiff

Kismet Acquisition, LLC, a Delaware  
limited liability company

Geraldine A. Valdez (Bar No. 174305)  
Kendra J. Hall (Bar No. 166836)  
PROCOPIO, CORY, HARGREAVES  
& SAVITCH LLP  
530 B Street, Suite 2100  
San Diego, California 92101  
Telephone: 619.238.1900

D. Anthony Gaston (Bar No. 57074)  
Attorney At Law  
Corporate Center  
550 West C Street, Suite 700  
San Diego, California 92101  
Telephone: 619.234.3103

Attorneys for Defendants Alejandro Diaz-  
Barba and Martha Margarita Barba de la Torre

Attorneys for Defendant  
Martha Margarita Barba de la Torre

Stephen B. Morris (Bar No. 126192)  
Mark C. Hinkley (Bar No. 138759)  
MORRIS & ASSOCIATES  
444 West C Street, Suite 300  
San Diego, California 92101  
Telephone: 619.239.1300

Attorneys for Defendant Alejandro Diaz-Barba

UNITED STATES BANKRUPTCY COURT  
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

In re:

JERRY LEE ICENHOWER dba Seaview  
Properties, and DONNA LEE ICENHOWER,  
  
Debtors

Case No. 03-11155-LA7

Chapter 7

Adv. Proc. No.: 06-90369  
Adv. Proc. No.: 04-90392

KISMET ACQUISITION, LLC,  
  
Plaintiff,  
  
v.  
  
JERRY L. ICENHOWER; et al.,  
  
Defendants.

**NOTICE OF APPEAL**

Date: None Set  
Time: None Set  
Dept: Two  
Judge: Hon. Louise DeCarl Adler

TO THE COURT, ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT Defendants Martha Margarita Barba de la Torre, aka  
Martha Barba de Diaz, Martha Barba deDiaz, Martha Barba Diaz, Martha M. Diaz, Martha  
Margarita Diaz, Martha B. Diaz and Martha B. de Diaz, and Alejandro Diaz-Barba, an individual,  
aka Alejandro Diaz Barba, Alex Diaz, Porfirio Alejandro Diaz, Alejandro B. Diaz, Porfirioa Diaz

Bk. No. 03-11155-LA7  
Adv. Proc. No. 06-90369; 04-90392

and Porfirio Diaz ("Appellants") appeal under 28 U.S.C. section 158(a) and Rules 8001(a) and 8002(a) of the Federal Rules of Bankruptcy Procedure from the judgment of the Bankruptcy Court entitled Consolidated Judgment entered on June 2, 2008 (Docket Nos. 213 and 504), from the Consolidated Findings of Fact and Conclusions of Law entered by the Bankruptcy Court on June 2, 2008 (Docket Nos. 212 and 503), and from the Order on Motion to Alter or Amend Consolidated Judgment entered on July 30, 2008 (Docket Nos. 239 and 530), copies of which are attached hereto as Exhibits A, B and C.

The names of all parties to the judgment appealed from and the names, addresses, telephone, e-mail and fax numbers of their respective attorneys are as follows:

<p>Geraldine A. Valdez Kendra J. Hall Farzeen Essa Procopio, Cory, Hargreaves &amp; Savitch LLP 530 B Street, Suite 2100 San Diego, CA 92101 Telephone: 619-238-1900 Facsimile: 619-235-0398 e-mail <a href="mailto:gav@procopio.com">gav@procopio.com</a></p> <p><i>Attorneys for Defendants Alejandro Diaz-Barba &amp; Martha Margarita Barba de la Torre</i></p>	<p>Stephen B. Morris, Esq. Morris &amp; Associates 444 West C St., Ste. 200 San Diego, CA 92101 Telephone: 619-239-1300 Facsimile: 619-234-3672 e-mail: <a href="mailto:morris@sandiegolegal.com">morris@sandiegolegal.com</a></p> <p><i>Attorneys for Defendant Alejandro Diaz-Barba</i></p>
<p>D. Anthony Gaston (SBN 57074) Attorney At Law Corporate Center 550 West C. Street, Suite 700 San Diego, CA 92101 Telephone: 619-234-3103 e-mail: <a href="mailto:daglaw@sbcglobal.net">daglaw@sbcglobal.net</a></p> <p><i>Attorney for Defendant Martha Margarita Barba de la Torre</i></p>	<p>Ali M.M. Mojdehi, Esq. Christine E. Baur, Esq. Janet D. Gertz, Esq. Baker &amp; McKenzie LLP 12544 High Bluff Drive, Suite 300 San Diego, CA 92130 Telephone: 858-523-6280 Facsimile: 858-259-8290 e-mail <a href="mailto:ali.m.m.mojdehi@bakernet.com">ali.m.m.mojdehi@bakernet.com</a></p> <p><i>Attorneys for Plaintiffs Kismet Acquisition, LLC</i></p>

Gerald H. Davis  
Chapter 7 Trustee  
P.O. Box 121111  
San Diego, CA 92112-1111  
Telephone: (619) 400-9997  
Facsimile: (619) 996-2006  
[davisatty@aol.com](mailto:davisatty@aol.com)

Gary B. Rudolph, Esq.  
Sparber Rudolph Annen APLC  
701 B Street, Suite 1000  
San Diego, CA 92101  
Telephone: 239-3600  
Facsimile: 239-5601  
[grudolph@sparberlaw.com](mailto:grudolph@sparberlaw.com)

*Attorneys for Chapter 7 Trustee, Gerald H. Davis*

Jerry L. Icenhower  
Donna L. Icenhower  
684 Margarita Ave.  
Coronado, CA 92118  
Telephone: (619) 435-2757  
[jicenho@yahoo.com](mailto:jicenho@yahoo.com)

Ronald White, Esq.  
762 W. El Segundo Blvd.  
Gardena, CA 90247  
Telephone: 310-327-3364  
Facsimile: 310-327-3365

*Pro Se*

*Attorneys for Craig Kelley*

DATED: August 6, 2008

PROCOPIO, CORY, HARGREAVES  
& SAVITCH, LLP

By: /s/ Geraldine A. Valdez  
Geraldine A. Valdez, Attorneys Defendants  
Alejandro Diaz-Barba and  
Martha Margarita Barba de la Torre

AUG-08-2008 11:31AM FROM-

T-900 P.001 F-100

**BAKER & MCKENZIE****Facsimile Transmission**

Baker & McKenzie LLP  
12544 High Bluff Drive, Third Floor  
San Diego, California 92130-3051 USA

Tel: +1 858 523 6200  
Fax: +1 858 259 8290  
www.bakernet.com

**Date** August 8, 2008 **Phone** **Fax**  
**To** Ms. Sarah Stevenson,  
Bankruptcy Appellate Panel for the Ninth  
Circuit 626-229-7475  
**From** Janet D. Gertz +1 858 523 6280 +1 858 259 8290  
**Client/Matter No.** 67188539-000001  
**Re** Kismet v. Diaz (In re Icenhower)  
**Pages (w/cover)** 38 - Please see the attached

11:39 A.M.  
**RECEIVED**  
Harold S. Magnus, Clerk  
U. S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT

AUG 8 2008

**FILED** \_\_\_\_\_  
**DOCKETED** \_\_\_\_\_  
DATE INITIAL

**Privacy And Confidentiality Notice**

The information contained in this facsimile is intended for the named recipients only. It may contain privileged and confidential information and if you are not an intended recipient, you must not copy, distribute or take any action in reliance on it. If you have received this facsimile in error, please notify us immediately by a collect telephone call to Office Services at +1 858 523 6309 and return the original to the sender by mail. We will reimburse you for the postage.

Baker & McKenzie LLP is a member of Baker & McKenzie International, a Swiss Verein.  
SDODMS1/682396.1

AUG-08-2008 11:32AM FROM-

T-800 P.002 F-100

**BAKER & MCKENZIE**

Baker & McKenzie LLP  
12544 High Bluff Drive, Third Floor  
San Diego, California 92130-3051, USA

Tel: +1 858 523 6200  
Fax: +1 858 259 8290  
www.bakernet.com

Asia  
Pacific  
Bangkok  
Beijing  
Hong Kong  
Jakarta  
Kuala Lumpur  
Manila  
Melbourne  
Shanghai  
Singapore  
Sydney  
Taipei  
Tokyo

Europe &  
Middle East  
Amman  
Amsterdam  
Antwerp  
Bahrain  
Baku  
Barcelona  
Berlin  
Bologna  
Brussels  
Budapest  
Cairo  
Düsseldorf  
Frankfurt / Main  
Geneva  
Kyiv  
London  
Madrid  
Milan  
Moscow  
Munich  
Paris  
Prague  
Riyadh  
Rome  
St. Petersburg  
Stockholm  
Vienna  
Warsaw  
Zurich

North & South  
America  
Bogota  
Buenos Aires  
Caracas  
Chicago  
Cincinnati  
Dallas  
Guatemala  
Houston  
Jalisco  
Mexico City  
Miami  
Montreal  
New York  
Palo Alto  
Porto Alegre  
Rio de Janeiro  
San Diego  
San Francisco  
Santiago  
Sao Paulo  
Tijuana  
Toronto  
Vancouver  
Washington, DC

August 8, 2008

Ms. Sarah Stevenson  
Bankruptcy Appellate Panel for the Ninth Circuit  
Richard H. Chambers United States Court of Appeals Building  
125 South Grand Avenue  
Pasadena, California 91105

Janet D. Gertz  
Tel: +1 858 523 6283  
janet.d.gertz@bakernet.com

Via Facsimile (626) 229-7475

RE: Kismet v. Diaz (In re Icenhower)  
Bankr. No. 03-11155-LA7; Adv. Proc. Nos. 04-90392; 06-90369

Dear Ms. Stevenson:

Pursuant to your request, we submit on behalf of the Appellee and Plaintiff, Kismet Acquisition, LLC ("Kismet"), a brief summary of Kismet's position with respect to the status and disposition of the Emergency Motion of Defendants Martha Margarita Barba de la Torre and Alejandro Diaz-Barba ("Diaz Defendants") for Stay of Judgment Pending Appeal ("Emergency Stay Motion").

As a preliminary matter, the Diaz Defendants' claimed exigencies regarding excessive delay in obtaining an order from the Bankruptcy Court on their Emergency Stay Motion filed with that court on July 31, 2008, allegedly precipitating their filing of a parallel Emergency Stay Motion with the Bankruptcy Appellate Panel on August 6, 2008, are not well taken. First, counsel for the Diaz Defendants did not request a consensual stay from Kismet prior to taking this most unusual action. Kismet would have been more than willing to accommodate any request for a consensual extension of the stay for any period required for the Bankruptcy Court to review and rule on the stay request. [See e-mail from Ali Mojdehi to Geraldine A. Valdez dated August 7, 2007, attached hereto as Exhibit "A".] Second, the Diaz Defendants did not seek a bridging order from the Bankruptcy Court. Third, although the Diaz Defendants' Emergency Stay Motion was filed on July 31, 2007, the Diaz Defendants' notice of appeal was not filed until the afternoon of *August 6, 2008*, that is, the same day the Diaz Defendants filed their Emergency Motion with the Bankruptcy Appellate Panel. Absent an operative appeal on file, no stay order could issue from the Bankruptcy Court in any event. "The request for a stay pending appeal, 'requires as a prerequisite an appeal.' *Gold v. Laines (In re Laines)*, 2005 Bankr. LEXIS 2267 (Bankr. E.D. Va. Mar. 23, 2005). Thus, the exigency, if any, was self created in part by the delay in filing the notice of appeal.

The Diaz Defendants' Emergency Stay Motion filed with the Bankruptcy Appellate Panel is, however, now moot. First, the Bankruptcy Court for the Southern District of California, the Honorable Louise DeCarl Adler presiding, has this morning entered orders in both of the above adversary proceedings, denying the Diaz Defendants' Emergency Motion for Stay Pending Appeal filed with the Bankruptcy Court. Copies of these orders, dated August 7,

Baker & McKenzie LLP is a member of Baker & McKenzie International, a Swiss Verein.

AUG-08-2008 11:32AM FROM-

T-900 P.003 F-100

**BAKER & MCKENZIE**

2008, are attached hereto as Exhibit "B". A copy of Kismet's Opposition, a portion of which was incorporated by reference into the Court's orders, is attached hereto as Exhibit "B-1".

Furthermore, on August 7, 2008, Kismet filed its election to have the appeal heard by the District Court for the Southern District of California. Copies of the election are attached hereto as Exhibit "C". Any further request for a stay by the Diaz Defendants' must thus be sought from the District Court.

Please do not hesitate to contact me if you require any further information concerning this matter.

Sincerely,

**Baker & McKenzie LLP**

  
Janet D. Gertz

Enclosures

cc Ali M.M. Mojdehi (w/o enclosures)  
Geraldine A. Valdez (w/o enclosures)  
D. Anthony Gaston (w/o enclosures)  
Stephen B. Morris (w/o enclosures)  
Jerry L. Icenhower (w/o enclosures)  
Barry Lander, Clerk of the US Bankruptcy Court, Southern District of California

AUG-08-2008 11:32AM FROM-

T-900 P.004/038 F-100

**EXHIBIT "A"**

AUG-08-2008 11:32AM FROM-

T-900 P.005/038 F-100

From: Mojdehi, Ali M M  
Sent: Thursday, August 07, 2008 1:31 PM  
To: 'gav@procopio.com'; 'jeanne\_bender@casb.uscourts.gov'  
Cc: Genz, Janet; Mayo, Terri L  
Subject: Re: Kismet v. Diaz

Geraldine - I am out of the country and this is the first I have heard about your filing with the BAP or your concern about timing. We are happy to agree to an informal stay pending the bankruptcy court's ruling. You filed a voluminous motion so it took some time to respond to it and the bankruptcy court may desire some additional time to consider all the paper, and if it does, our informal agreement should accomodate all concerned. Having said that, Rule 8005 is clear that a stay request must be presented and considered by the bankruptcy court first. Unless you agree to withdraw your request in light of our informal agreement to stay pending a ruling, we will notify the BAP of our objection. You should also be aware that we intend to elect to have this matter heard by the district court, in any event. Thank you.

Ali M. M. Mojdehi  
Baker & McKenzie LLP  
Tel: + 858 523 6280  
Cell: + 619 549 4000  
Fax: + 858 259 8290  
ali.m.m.mojdehi@bakernet.com

-----Original Message-----

From: Valdez, Geraldine A. <gav@procopio.com>  
To: jeanne\_bender@casb.uscourts.gov <jeanne\_bender@casb.uscourts.gov>  
CC: Mojdehi, Ali M M  
Sent: Thu Aug 07 12:57:10 2008  
Subject: Kismet v. Diaz

Dear Jeanne:

I just returned from lunch to see that Kismet had finally filed an opposition to the emergency motion we filed with the court one week ago. As you know, Judge Adler's amended judgment stayed enforcement for only ten days. That ten days will run on Sunday. Therefore, we were left with no choice but to refile the emergency motion with the BAP yesterday afternoon. Otherwise, there would have been no way to file the motion there before the stay expired, in the event Judge Adler were to deny the motion.

We messengered a courtesy copy of the papers that we filed with the BAP to the court this morning, so you will probably have received them by now.

Rgds  
Geraldine

-----  
08/07/08, 12:57:15

This is an email from Procopio, Cory, Hargreaves & Savitch LLP, Attorneys at Law. This email and any attachments hereto may contain information that is confidential and/or protected by the attorney-client privilege and attorney work product doctrine. This email is not intended for transmission to, or receipt by, any unauthorized persons. Inadvertent disclosure of the contents of this email or its attachments to unintended recipients is not intended to and does not constitute a waiver of attorney-client privilege or attorney work product protections. If you have received this email in error, immediately notify the sender of the erroneous receipt and destroy this email, any attachments, and all copies of same, either electronic or printed. Any disclosure, copying, distribution, or use of the contents or information received in error is strictly prohibited.

AUG-08-2008 11:32AM FROM-

T-800 P.006/038 F-100

Federal tax regulations require us to notify you that any tax advice in this electronic message was not intended or written to be used, and cannot be used, for the purpose of avoiding penalties.

=====

AUG-08-2008 11:32AM FROM-

T-900 P.007/038 F-100

**EXHIBIT "B"**

AUG-08-2008 11:32AM FROM-

T-800 P.008/038 F-100

CSD 3000A [11/15/04]

Name, Address, Telephone No. &amp; I.D. No

Geraldine A. Valdez, Bar No. 174305

PROCOPIO, CORY, HARGREAVES &amp; SAVITCH

530 B Street, Suite 2100

San Diego, California 92101

Telephone: 619.238.1900

Order Entered on  
August 08, 2008  
by Clerk U.S. Bankruptcy Court  
Southern District of California

## UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF CALIFORNIA

325 West "F" Street, San Diego, California 92101-6991

In Re JERRY LEE ICENHOWER, dba Seaview Properties, and  
DONNA LEE ICENHOWER

BANKRUPTCY NO. 03-11155-LA7

Debtor.

KISMET ACQUISITION, LLC

ADVERSARY NO. 06-90369  
04-90392

Plaintiff(s)

v.  
JERRY L. ICENHOWER dba Seaview Properties and DONNA  
L. ICENHOWER, fka DONNA L. HAWKS, et al.Date of Hearing: None Set  
Time of Hearing: None Set  
Name of Judge: Hon. Louise DeCarl Adler

Defendant(s)

[PROPOSED] ALTERNATE ORDER ON EMERGENCY MOTION OF DEFENDANTS MARTHA  
MARTARITA BARBA DE LA TORRE AND ALEJANDRO DIAZ-BARBA FOR STAY OF JUDGMENT  
PENDING APPEAL

IT IS ORDERED THAT the relief sought as set forth on the continuation pages attached and numbered two (2)  
through 2 with exhibits, if any, for a total of 2 pages, is granted. Motion/Application Docket Entry No. 241/532

// FOR THE REASONS SET FORTH IN PART II, PG. 3-6, OF OPPOSITION OF PLAINTIFF KISMET  
// (D.E. #536), DIAZ DEFENDANTS ARE NOT ENTITLED TO A STAY UNDER F.R.B.P. 7062(d), NOR  
// DOES COURT HAVE THE PRESENT ABILITY TO CALCULATE THE APPROPRIATE AMOUNT OF  
// ANY SUCH BOND.

August 07, 2008

DATED:

Signature by the attorney constitutes a certification under  
Fed. R. of Bankr. P. 9011 that the relief in the order is the  
relief granted by the court.

Submitted by:

Procopio, Cory, Hargreaves &amp; Savitch LLP

(Firm name)

By: Geraldine A. Valdez

CSD 3000A

NOT APPROVED

*Louise DeCarl Adler*  
Judge, United States Bankruptcy Court

AUG-08-2008 11:32AM FROM-

T-800 P.008/038 F-100

Attorney for ☐ Plaintiff ☐ Defendant

CSD 3000A [11/15/04] (Page 2)  
ORDER ON EMERGENCY MOTION, etc.  
DEBTOR: ICENHOWER

CASE NO: 03-11155-LA7  
ADV. NO.: 06-90369/04-90392

The Court, having considered the Emergency Motion of Defendants Martha Margarita Barba De La Torre and Alejandro Diaz-Barba ("Defendants") for Stay of Judgment Pending Appeal (the "Motion"), the Memorandum of Points and Authorities and Declaration of Farzeen Essa in support thereof, and for good cause appearing,

IT IS HEREBY ORDERED AS FOLLOWS:

1. The Motion is granted.
2. Pursuant to Federal Rules of Bankruptcy Procedure 7062 and 8005, enforcement of the Consolidated Judgment entered by the Court on June 2, 2008 and the Amended Consolidated Judgment attached as Exhibit A to the Court's Order on Motion to Alter or Amend Consolidated Judgment entered July 30, 2008 is hereby stayed pending appeal, conditioned on Defendants' filing a supersedeas bond in the amount of \$\_\_\_\_\_.

CSD 3000A

American LegalNet, Inc.  
www.USCourtForms.com

Signed by Judge Louise DeCarli Adler August 07, 2008

AUG-08-2008 11:33AM FROM-

T-900 P.010/038 F-100

CSD 3000A (11/15/04)

Name, Address, Telephone No. &amp; I.D. No.

Geraldine A. Valdez, Bar No. 174305

PROCOPIO, CORY, HARGREAVES &amp; SAVITCH

530 B Street, Suite 2100

San Diego, California 92101

Telephone: 619.238.1900

Order Entered on  
August 08, 2008  
by Clerk U.S. Bankruptcy Court  
Southern District of California

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF CALIFORNIA  
325 West "F" Street, San Diego, California 92101-6991

In Re JERRY LEE ICENHOWER, dba Seaview Properties, and  
DONNA LEE ICENHOWER

Debtor.

BANKRUPTCY NO. 03-11155-LA7

KISMET ACQUISITION, LLC

Plaintiff(s)

ADVERSARY NO. 06-90369  
04-90392

v.

JERRY L. ICENHOWER dba Seaview Properties and DONNA  
L. ICENHOWER, fka DONNA L. HAWKS, et al.

Defendants(s)

Date of Hearing: None Set  
Time of Hearing: None Set  
Name of Judge: Hon. Louise DeCarl Adler

[PROPOSED] ORDER ON EMERGENCY MOTION OF DEFENDANTS MARTHA MARTARITA  
BARBA DE LA TORRE AND ALEJANDRO DIAZ-BARBA FOR STAY OF JUDGMENT PENDING  
APPEAL

IT IS ORDERED THAT the relief sought as set forth on the continuation pages attached and numbered two (2)  
through 2 with exhibits, if any, for a total of 2 pages, is granted. Motion/Application Docket Entry No. 241/532  
// FOR THE REASONS SET FORTH IN PART III, PG. 6-17, OF PLAINTIFF KISMET'S OPPOSITION  
// (D.E. #245), COURT DECLINES TO ISSUE A DISCRETIONARY STAY PURSUANT TO  
// F.R.B.. 7062(c).

DATED: August 07, 2008

Signature by the attorney constitutes a certification under  
Fed. R. of Bankr. P. 9011 that the relief in the order is the  
relief granted by the court.

Submitted by:

Procopio, Cory, Hargreaves & Savitch LLP  
(Firm name)

By: /s/ Geraldine A. Valdez

Attorney for ☐ Plaintiff ☐ Defendant

NOT APPROVED

*Louise DeCarl Adler*  
Judge, United States Bankruptcy Court

CSD 3000A

American LegalNet, Inc.  
www.USCourtForms.com

AUG-08-2008 11:33AM FROM-

T-900 P.011/038 F-100

CSD 3000A (11/15/04) (Page 2)  
ORDER ON EMERGENCY MOTION, etc.  
JEBTOR: ICENHOWER

CASE NO: 03-11155-LA7  
ADV. NO.: 08-90369/04-90392

The Court, having considered the Emergency Motion of Defendants Martha Margarita Barba De La Torre and Alejandro Diaz-Barba ("Defendants") for Stay of Judgment Pending Appeal (the "Motion"), the Memorandum of Points and Authorities and Declaration of Farzaen Essa in support thereof, and for good cause appearing,

IT IS HEREBY ORDERED AS FOLLOWS:

1. The Motion is granted.
2. Pursuant to Federal Rules of Bankruptcy Procedure 7062 and 8005, enforcement of the Consolidated Judgment entered by the Court on June 2, 2008 and the Amended Consolidated Judgment attached as Exhibit A to the Court's Order on Motion to Alter or Amend Consolidated Judgment entered July 30, 2008 is hereby stayed pending appeal.

CSD 3000A

American LegalNet, Inc.  
www.USCourtForms.com

Signed by Judge Louise DeCari Adler August 07, 2008

AUG-08-2008 11:33AM FROM-

T-800 P.012/038 F-100

**EXHIBIT "B-1"**

AUG-08-2008 11:33AM FROM-

T-800 P.013/038 F-100

1 Ali M.M. Mojdehi, State Bar No. 123846  
 Janet D. Gertz, State Bar No. 231172  
 2 **BAKER & MCKENZIE LLP**  
 12544 High Bluff Drive, Third Floor  
 3 San Diego, CA 92130-3051  
 Telephone: +1 858-523-6200

4 Attorneys for Plaintiff  
 5 **KISMET ACQUISITION, LLC**

6  
 7  
 8 **UNITED STATES BANKRUPTCY COURT**  
 9 **SOUTHERN DISTRICT OF CALIFORNIA**  
 10

11 In re

12 **JERRY LEE ICENHOWER dba Seaview**  
 13 **Properties, and DONNA LEE ICENHOWER,**

14 Debtors.

15 **KISMET ACQUISITION, LLC,**

16 Plaintiff,

17 v.

18 **JERRY L. ICENHOWER an individual; et al.**

19 Defendants.  
 20  
 21  
 22  
 23

Case No. 03-11155-LA-7

Chapter Number 7

Adv. Proc. No: 04-90392

Adv. Proc. No: 06-90369

**OPPOSITION BY PLAINTIFF  
 KISMET ACQUISITION, LLC TO  
 EMERGENCY MOTION OF  
 DEFENDANTS MARTHA BARBA  
 AND ALEJANDRO DIAZ-BARBA  
 FOR STAY OF JUDGMENT  
 PENDING APPEAL [FED. R. BANKR.  
 PROC. 7062, 8005]**

DATE: None set

TIME None set

DEPT: 2

JUDGE: Hon. Louise DeCarl Adler

24 ///

25 ///

26 ///

27 ///

28 ///

Baker & McKenzie LLP  
 12544 High Bluff Drive,  
 Third Floor  
 San Diego, CA 92130  
 +1 858 523 6200

1  
 OPPOSITION BY PLAINTIFF KISMET ACQUISITION, LLC TO EMERGENCY MOTION OF DEFENDANTS MARTHA BARBA  
 AND ALEJANDRO DIAZ-BARBA FOR STAY OF JUDGMENT PENDING APPEAL [FED. R. BANKR. PROC. 7062, 8005]  
 SDODMS1/692323 1

AUG-08-2008 11:33AM FROM-

T-900 P.014/038 F-100

**TABLE OF CONTENTS**

	<u>Page</u>
I. THE DIAZ DEFENDANTS ASSERT A REVISIONIST FACTUAL BACKGROUND .....	2
II. THE DIAZ DEFENDANTS ARE NOT ENTITLED TO A STAY OF RIGHT UNDER FED. R. BANKR. PROC 7062(D).....	3
III. THE DIAZ DEFENDANTS ARE NOT ENTITLED TO A DISCRETIONARY STAY UNDER FED. R. BANKR. PROC. 7062(C) .....	6
A. Under Rule 8005, the Governing Law Requires Each Hilton Element to be Satisfied.....	6
B. The Diaz Defendants Cannot Demonstrate Any Probability of Success on the Merits .....	9
1. The Court Has Subject Matter Jurisdiction Over the Adversary Proceedings.....	10
2. The Recovery Pursuant to Section 550 Has No Extraterritorial Effect; Avoidance of a Post-Petition Transfer of Property of the Estate Under Section 549 of the Bankruptcy Code Has Express Extraterritorial Application.....	11
3. There Are No Facts Suggesting Comity Should Have Been Applied .....	12
C. The Diaz Defendants' Claims of Irreparable Harm are of No Consequence .....	15
D. The Public Interest Does Not Militate in the Diaz Defendants' Favor.....	17
IV. CONCLUSION.....	18

## TABLE OF AUTHORITIES

Page

## FEDERAL CASES

1		
2		
3		
4	<i>Acevedo-Garcia v. Vera Monroig</i> ,	
5	296 F.3d 13 (1st Cir. 2002).....	9
6	<i>Acton v. Fullmer (In re Fullmer)</i> ,	
7	323 B.R. 287 (Bankr. D. Nev. 2005).....	2
8	<i>In re Adelpia Communications Corp.</i> ,	
9	361 B.R. 337 (S.D.N.Y. 2007).....	2
10	<i>Allstate Life Ins. Co. v. Linter Group Ltd.</i> ,	
11	994 F.2d 996 2d (cir. 1993).....	12
12	<i>Ariz. Contrs. Ass'n, Inc. v. Candelaria</i> , No. CV07-02496, 2008 U.S. Dist. 2008.....	2, 6
13	<i>Blankenship v. Boyle</i> ,	
14	447 F.2d 1280 (D.D.C. 1971).....	1
15	<i>Brady v. Brown</i> ,	
16	51 F.3d 810 (9th Cir. 1995).....	11, 14
17	<i>In re Brun</i> ,	
18	360 B.R. 669.....	6
19	<i>In re Capital West Investors</i> ,	
20	180 B.R. 240 (N.D. Cal. 1995).....	3, 4
21	<i>County of Alameda v. Weinberger</i> ,	
22	520 F.2d 344, 1975 U.S. App. LEXIS 14117 (9th Cir. 1975).....	7, 9
23	<i>Donovan v. Fall River Foundry Co.</i> ,	
24	696 F.2d 524 (7th Cir. 1982).....	3
25	<i>E.E.O.C. v. Arabian American Oil Co.</i> ,	
26	499 U.S. 244 (1991).....	11
27	<i>Fall v. Eastin</i> ,	
28	215 U.S. 1 (1909)].....	10, 11
	<i>Feltman v. Warmus (In re American Way Serv. Corp.)</i> ,	
	229 B.R. 496 (Bankr. S.D. Fla. 1999).....	6
	<i>In re Forty-Eight Insulations, Inc.</i> ,	
	115 F.3d 1294 (7th Cir. 1997).....	8, 9, 10
	<i>Gagan v. Sharer</i> ,	
	2005 U.S. Dist. LEXIS 27409 (D. Ariz. Nov. 1, 2005).....	1
	<i>Garcia-Mir v. Meese</i> ,	
	781 F.2d 1450 (11th Cir. 1986).....	9

AUG-08-2008 11:33AM FROM-

T-900 P.016/038 F-100

## TABLE OF AUTHORITIES

Page

1		
2		
3		
4	<i>Gleasant v. Jones, Day, Reavis &amp; Pogue (In re Gleasant),</i>	
5	111 B.R. 595 (Bankr. W.D. Tex. 1990) .....	5
6	<i>Golden Gate Restaurant Ass'n. v. City of San Francisco,</i>	
7	512 F.3d 1112 (9th Cir. 2008) .....	7
8	<i>Goldies Bookstore, Inc. v. Superior Court,</i>	
9	739 F.2d 466 .....	2
10	<i>Government Guarantee Fund of the Republic of Finland v. Hyatt Corp.,</i>	
11	167 F.R.D. 399 (D.V.I. 1996) .....	5
12	<i>Gushi Bros. Co. v. Bank of Guam,</i>	
13	28 F.3d 1535 (9th Cir. 1994) .....	11, 12
14	<i>In re Hargis,</i>	
15	887 F.2d 77 (5th Cir. 1989) .....	13
16	<i>Hartford Fire Ins.,</i>	
17	509 U.S. at 799 .....	13
18	<i>Hebert v. Exxon Corp.,</i>	
19	953 F.2d 936 (5th Cir. 1992) .....	4, 5
20	<i>Hilton v. Braunskill,</i>	
21	481 U.S. 770 (1987) .....	6, 7
22	<i>Hilton v. Guyot,</i>	
23	159 U.S. 113, 16 S. Ct. 139, 40 L. Ed. 95 (1895) .....	12
24	<i>Hong Kong &amp; Shanghai Banking Corp. v. Simon (In re Simon),</i>	
25	153 F.3d 991 (9th Cir. 1998) .....	14
26	<i>In re Issa Corp.,</i> 142 Bankr. 75, 78 .....	1
27	<i>In re Krause,</i>	
28	2007 Bankr. LEXIS 3049 .....	2
	<i>LaRouche v. Kezer,</i>	
	20 F.3d 68 (2d Cir. 1994) .....	10
	<i>Lopez v. Heckler,</i>	
	713 F. 2d 1432 (9th Cir. 1983, rev'd on other grounds, 469 US. 1082 (1984) .....	7, 8
	<i>In re Max Sugarman Funeral Home, Inc.,</i>	
	94 B.R. 16 (Bankr. D.R.I. 1988) .....	4
	<i>Maxwell Commc'n Corp. PLC v. Societe Generale PLC (In re Maxwell Commc'n Corp.),</i>	
	93 F.3d 1036 (2d Cir. 1996) .....	13

## TABLE OF AUTHORITIES

Page

1		
2		
3		
4	<i>Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog,</i>	
5	945 F.2d 150 (6th Cir. Mich. 1991).....	9
6	<i>Miller v. LeSEA Broadcasting, Inc.,</i>	
7	927 F. Supp. 1148 (E.D. Wisc. 1996).....	5
8	<i>Mohammed v. Reno,</i>	
9	309 F.3d 95 (2d Cir. 2002).....	10
10	<i>NLRB v. Westphal,</i>	
11	859 F.2d 818 (9th Cir. 1988).....	3
12	<i>Natural Res. Def. Council, Inc. v. Winter,</i>	
13	502 F.3d 859 (9th Cir. 2007).....	7
14	<i>O'Hagan v. U.S.,</i>	
15	86 F. 3d 776 (8th Cir. 1996).....	1
16	<i>Ohanian v. Irwin (In re Irwin),</i> 338 B.R. AT 839.....	9
17	<i>Rose Townsend Trust v. Johnston (In re Johnston),</i>	
18	No. 06-80040, 2007 WL 2684736 (Bankr. E.D. Wash. Sept. 7, 2007).....	8
19	<i>Silicon Valley Bank v. Pon (In re Pon),</i>	
20	1994 U.S. Dist. LEXIS 2559 (LEXIS Citation only) (N.D. Cal. Feb. 25, 1994) (citing <i>In</i>	
21	<i>re Dial Industries, Inc.</i> , 137 Bankr. 247, 250-251 (Bankr. N.D. Ohio 1992)).....	8
22	<i>Thomas v. City of Evanston,</i>	
23	636 F.Supp. 587 (An appellant's failure to meet their burden of persuasion regarding	
24	even one of these factors requires denial of the stay).....	8
25	<i>United States v. Fitzgerald,</i>	
26	884 F. Supp. 376 (D. Idaho 1995).....	9
27	<i>United States v. Krause (In re Krause),</i>	
28	No. 05-17429, 2007 Bankr. LEXIS 3049 (Bankr. D. Kansas August 29, 2007).....	5
	<i>United States v. Mansion House Center Redevelopment Co.,</i>	
	682 F. Supp. 446 (E.D. Mo. 1988).....	4
	<i>United States v. Texas,</i>	
	523 F. Supp. 703 (E.D. Tex. 1981).....	2
	<i>In re Wymer,</i>	
	5 B.R. 806 (B.A.P. 9th Cir. 1980).....	7
	<i>Yeganeh v. Sims (In re Yeganeh),</i>	
	2006 U.S. Dist. LEXIS 32765 (N.D. Cal. May 12, 2006).....	2, 9

## TABLE OF AUTHORITIES

Page

## STATE CASES

<i>Cf. Hurtado v. Superior Court</i> , 11 Cal. 3d 574, 522 P.2d 666, 114 Cal. Rptr. 106 (Cal. 1974).....	13
---	----

## DOCKETED CASES

<i>Dynamic Finance Corp. v. Kipperman (In re North Plaza, LLC)</i> , Case No. 08-CV-1194.....	8
--	---

## FEDERAL STATUTES AND RULES

11 U.S.C. § 541(a) .....	12
28 U.S.C. §§ 157(a) .....	12
Under 28 U.S.C. § 1334(e) .....	12, 14
9th Cir. Rule 36-3 .....	8
Fed. R. App. Proc. 32.1 .....	8
Fed. R. Bankr. Proc. 7062.....	2, 3, 6, 8
Fed. R. Civ. Proc. 62.....	2
Fed. Rule Bankr. Proc. 8005.....	6
Federal Rule Civ. Proc. 62(c) .....	6
Federal Rule Civ. Proc. 62(a) .....	2, 3, 4
Federal Rule Civ. Proc. 62(c) .....	7
Federal Rule Civ. Proc. 62(d) .....	3, 4
Fed. Rule Bankr. Proc. 1001 .....	3
Fed. Rule Bankr. Proc. 8005 .....	3, 6, 7, 8, 10,

## OTHER

2 Matthew Bender Practice Guide, <i>Federal Pretrial Civil Procedure in California</i> § 19.08[3][f] .....	7
---	---

1 Plaintiff Kismet Acquisition, LLC, ("Kismet") hereby submits its Opposition to the  
2 Emergency Motion of Defendants Martha Barba and Alejandro Diaz-Barba ("Diaz Defendants") for  
3 Stay of Judgment Pending Appeal ("Emergency Stay Motion"). For the reasons set forth below,  
4 Kismet respectfully requests the Court to deny the Motion.

5 A stay pending appeal is an "extraordinary remedy." It should be used sparingly. *Ariz.*  
6 *Contrs. Ass'n, Inc. v. Candelaria*, No. CV07-02496, 2008 U.S. Dist. 2008 WL 486002 (D. Ariz. Feb.  
7 19, 2008) (citing *United States v. Texas*, 523 F. Supp. 703, 729 (E.D. Tex. 1981)). Here, there is no  
8 reason for granting a stay.

9 The Emergency Stay Motion is determined pursuant to Fed. R. Bankr. Proc. 7062, which  
10 incorporates by reference Fed. R. Civ. Proc. 62, and Fed. R. Bankr. Proc. 8005, as they have been  
11 interpreted by the courts of the Ninth Circuit. As discussed below, there is no stay relief available to  
12 the Diaz Defendants under these Rules and their interpretive precedent.

13 First, the Diaz Defendants are not entitled to a stay of right upon the posting of a supersedeas  
14 bond pursuant to Fed. R. Bankr. Proc. 7062(d) because the judgment being appealed from is neither  
15 a monetary judgment nor it is closely analogous to a monetary judgment. Rather, the relief granted  
16 is most closely identified with a mandatory injunction. Second, the Diaz Defendants' cannot obtain  
17 a discretionary stay upon appeal under Fed. R. Bankr. Proc 7062(a) where they are unable to  
18 demonstrate any likelihood of success on the merits—much less the requisite high probability of  
19 success needed to justify a discretionary stay. As discussed below, the Diaz Defendants cannot  
20 demonstrate the existence of any *legitimate* legal questions in respect to the Court's Findings of Fact  
21 and Conclusions of Law and Amended Judgment (collectively, the "Judgment"). Furthermore,  
22 where, as here, the Diaz Defendants cannot present a colorable case on the merits on appeal, they are  
23 not otherwise entitled to a "free ticket" for a stay on appeal based solely upon their assertions that  
24 they will face irreparable harm from the execution of the Judgment. As such, the Diaz Defendants'  
25 request for a stay pending appeal should be denied.

26 **I. THE DIAZ DEFENDANTS ASSERT A REVISIONIST FACTUAL BACKGROUND**

27 The Diaz Defendants have included in their Emergency Stay Motion approximately seven  
28 pages of "Factual Background." The "Factual Background" plainly seeks to recharacterize the

AUG-08-2008 11:34AM FROM-

T-900 P.020/038 F-100

1 record through artful wordsmithing. For example, notably absent from the Diaz Defendants'  
 2 recitation are the substantial portion of the numerous "red flags" concerning the transaction, which  
 3 are otherwise presented in great detail in the Judgment. There is no mention in the Diaz Defendants  
 4 monologue of the Diaz Defendants' and their attorney's knowledge of the Debtors' bankruptcy prior  
 5 to the close of the 2004 transaction for the Villa Property. The narrative includes irrelevant *ad*  
 6 *hominem* attacks on the plaintiff, which are not supported by the record and, frankly, have no proper  
 7 place in the Emergency Motion. As such, Kismet opposes the entirety of Section II of the Diaz  
 8 Defendants' Emergency Stay Motion and submits in its place Section II of the Court's Consolidated  
 9 Findings of Fact and Conclusions of Law, which are incorporated herein by reference.

10 **II. THE DIAZ DEFENDANTS ARE NOT ENTITLED TO A STAY OF RIGHT UNDER**  
 11 **FED. R. BANKR. PROC 7062(d)**

12 The Diaz Defendants contend that they are entitled to receive a stay as a matter of right under  
 13 Fed. R. Bankr. Proc. 7062(d), provided that they post a supersedeas bond. Suggesting that the  
 14 Amended Judgment is "comparable to" a money judgment, the Diaz Defendants boldly claim that "if  
 15 the Court is unwilling to grant a discretionary stay without a bond, it must set the amount of the bond  
 16 in accordance with Federal Rule of Bankruptcy Procedure 7062(d). [Motion at 25.] This is not an  
 17 accurate depiction of the applicable law concerning the requirement for obtaining a stay in  
 18 connection with the posting of a supersedeas bond.

19 Fed. R. Civ. Proc. 62(d) provides that "[w]hen an appeal is taken the appellant by giving a  
 20 supersedeas bond may obtain a stay subject to the exceptions contained in subdivision (a) of this  
 21 rule." Rule 62(a) provides that "[u]nless otherwise ordered by the court, an interlocutory or final  
 22 judgment in an action for an injunction or in a receivership action, or a judgment or order directing  
 23 an accounting in an action for infringement of letters patent," shall not be stayed pending appeal.  
 24 The Ninth Circuit strictly limits the application of Rule 62(d) to monetary judgments. *See NLRB v.*  
 25 *Westphal*, 859 F.2d 818 (9<sup>th</sup> Cir. 1988) (citing *Donovan v. Fall River Foundry Co.*, 696 F.2d 524 (7<sup>th</sup>  
 26 Cir. 1982)); *see also In re Capital West Investors*, 180 B.R. 240, 242 (N.D. Cal. 1995) (stating that  
 27 "the Seventh and Ninth Circuits have given clear effect to the limitation (of the stay of right to  
 28 appeals from money judgments)").

1 Courts necessarily utilize a comparability test for judgments that do not neatly fit into the  
 2 specific named categories articulated under Rule 62(a) and (d), determining which type they are  
 3 more closely analogous to. This application does not assist the Diaz Defendants here. No amount of  
 4 shoehorning and legal maneuvering will fit the "square peg" of the Amended Judgment into the  
 5 "round hole" of a monetary judgment.

6 The cases cited by the Diaz Defendants as examples are instructive and demonstrate the  
 7 requirement for a very close equivalency to a monetary judgment to be deemed "comparable." In  
 8 *Capital West*, the appellants were unsuccessful in attempting to argue that a supersedeas stay would  
 9 apply to an order confirming a chapter 11 plan. The court held that the order was not the  
 10 "equivalent" of a money judgment, but instead accomplished a distribution of rights among the  
 11 parties to the bankruptcy. *Id.* In *Hebert v. Exxon Corp.*, 953 F.2d 936 (5<sup>th</sup> Cir. 1992), the Fifth  
 12 Circuit extended a stay of right to a declaratory judgment that required the defendant to pay a  
 13 specific sum of money. The court aptly reasoned that the applicability of Rule 62(d) turned not on  
 14 the distinction between a declaratory or money judgment but rather "whether the judgment involved  
 15 is monetary or nonmonetary." *Id.* at 938. *United States v. Mansion House Center Redevelopment*  
 16 *Co.*, 682 F. Supp. 446, 450 (E.D. Mo. 1988) simply stands for the unremarkable proposition that a  
 17 foreclosure action on a deed of trust or mortgage—which represents the liquidation of the collateral  
 18 for a sum certain owed in default of a loan obligation—has equivalency to a money judgment.<sup>1</sup>

19 The policy underlying the limitation of Rule 62(d) to money judgments provides further  
 20 guidance as to why a supersedeas bond is inapplicable to these proceedings. Courts have restricted  
 21 the application of Rule 62(d) to judgments for money "because a bond may not adequately  
 22 compensate a non-appealing party for loss incurred as a result of the stay of a non-money judgment."  
 23 *Hebert*, 953 F.2d at 938 (citing *Westphal*, 859 F.2d at 819). In this respect, a stay of right is  
 24 unavailable where the transfer of an asset is involved, as a bond cannot compensate for the loss of  
 25 use of the asset by the appellee during the duration of the appeal. In this respect, the supersedeas  
 26

27 <sup>1</sup> *In re Max Sugarman Funeral Home, Inc.*, 94 B.R. 16 (Bankr. D.R.I. 1988), also cited by the Diaz  
 28 Defendants, provided no analysis whatsoever, otherwise appears to disagree with the narrow  
 approach followed in the Ninth and Seventh Circuits, and thus is not persuasive.

AUG-08-2008 11:35AM FROM-

T-900 P.022/038 F-100

1 bond must be a "kind for kind security to guaranty the [money] judgment" *Id.* (quoting *United*  
 2 *States v. United States Fishing Vessel MAYLIN*, 130 F.R.D. 684, 686 (S.D. Fla. 1990)). The Diaz  
 3 Defendants' unsupported proposition that actions "pertaining to possession of real property" should  
 4 always benefit from a stay of right upon posting of a supersedeas bond is belied by the substantial  
 5 weight of authority. In fact, a judgment affecting the *possession* of real property (as opposed to a  
 6 mortgage foreclosure action) will generally never be able to be treated "kind for kind" with money  
 7 because of the issues concerning compensation for the appellee's loss of the use of the property  
 8 during the pendency of the appeal. This is particularly true where, as here, income-producing  
 9 commercial property is involved. *See, e.g. Government Guarantee Fund of the Republic of Finland*  
 10 *v. Hyatt Corp.*, 167 F.R.D. 399 (D.V.I. 1996) (denying motion for stay of order to vacate hotel  
 11 property, holding that "the posting of mere money by Hyatt in this case cannot adequately ensure  
 12 that [appellee] would be adequately compensated for the lost possession and use of its property and  
 13 lost income from the operation of the Hotel during the pendency of an appeal"); *Miller v. LeSEA*  
 14 *Broadcasting, Inc.*, 927 F. Supp. 1148 (E.D. Wisc. 1996) (denying motion for stay of order requiring  
 15 defendant to sell television station property, holding that "where a party has been ordered to do or  
 16 perform an act, the monetary value of a delay in performance is not so readily ascertained").

17 As applied to core proceedings in bankruptcy cases, in all practicality, the supersedeas stay  
 18 rarely applies. *See Gleasman v. Jones, Day, Reavis & Pogue (In re Gleasman)*, 111 B.R. 595, 599  
 19 (Bankr. W.D. Tex. 1990) (observing that the nature of bankruptcy proceedings is such that  
 20 supersedeas stays are seldom applicable, because most bankruptcy court rulings adjust the relative  
 21 rights of parties to property) (footnotes omitted). Furthermore, where the property involved is  
 22 "property of the estate" subject to recovery and/or turnover, the suitability of a supersedeas bond is  
 23 even more remote. Such a judgment concerning property of the estate is "in the nature of equitable  
 24 or injunctive relief, notwithstanding the fact that it is not technically an injunction as referenced in  
 25 Rule 62(c)" *United States v. Krause (In re Krause)*, No. 05-17429, 2007 Bankr. LEXIS 3049 at \*6  
 26 (Bankr. D. Kansas August 29, 2007) [cited in LEXIS only].

27 Although judgments on avoidance actions can take the form of monetary judgments, the  
 28 Amended Judgment here specifically calls for recovery of the *property*. Throughout these

5

proceedings, Kismet has demanded recovery of the property and has eschewed a monetary judgment. The provisions of Section 550 of the Bankruptcy Code provide the prevailing plaintiff in an avoidance action the choice of whether to receive recovery of a money judgment or recovery of the property itself. The statute, in prescribing alternatives, is purposefully flexible to accomplish its remedial goal. *In re Brun*, 360 B.R. 669, 674; *Feliman v. Warmus (In re American Way Serv. Corp.)*, 229 B.R. 496 (Bankr. S.D. Fla. 1999). The policy behind providing the prevailing plaintiff this choice recognizes the troublesome valuation difficulties that necessarily exist with fraudulently transferred real or personal property assets and to otherwise ensure that the plaintiff captures any increase in the value of the property that may have occurred subsequent to the date of the fraudulent transfer. These same considerations also serve to negate the applicability of a stay of right to the Diaz Defendants now upon the posting of a bond where the Judgment requires transfer to Kismet of the fideicomiso trust interest. The proper amount of such a bond would be incalculable and Kismet would be left with unjust exposure to significant risk of loss.

As such, the proper analysis of the Diaz Defendants' right to a stay is under the test for a discretionary stay under Fed. R. Bankr. Proc. 7062(c). As explained below, the Diaz Defendants also fail that test.

### III. THE DIAZ DEFENDANTS ARE NOT ENTITLED TO A DISCRETIONARY STAY UNDER FED. R. BANKR. PROC. 7062(c)

#### A. Under Rule 8005, the Governing Law Requires Each *Hilton* Element to be Satisfied

A stay of a final order on the merits of a dispute is "an extraordinary device which should be sparingly granted." *Ariz. Contrs. Ass'n, Inc. v. Candelaria*, 2008 WL 486002 at \*5-6. In determining whether a discretionary stay should be granted from an appeal to a district court or bankruptcy appellate panel from the final order of the bankruptcy court under Fed. Rule Bankr. Proc. 8005, virtually all courts utilize the four factors used in determining whether to grant a stay pending appeal of a *preliminary* injunction under Federal Rule Civ. Proc. 62(c). That familiar four-part test articulated by the Supreme Court in *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987), has been adopted by virtually all the circuit courts of appeal, including the Ninth Circuit. That test is:

- (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits;
- (2) whether the applicant will be irreparably injured absent a stay;
- (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and
- (4) where the public interest lies.

*Id.*

Because the burden of meeting this standard lies with the moving party and is a heavy one, in respect to a stay of a final order on the merits, "more commonly stay requests will not meet this standard and will be denied." Wright, Miller & Kane, *Federal Practice and Procedure Civil 2d* § 2904 (West Pub. 1995 & Supp. 2008); see also 2 Matthew Bender Practice Guide, *Federal Pretrial Civil Procedure in California* § 19.08[3][f] (noting that the moving party bears the burden of proof as to each element of the test).

Although under Rule 8005 the four enumerated factors utilized in determining the applicability of a stay are identical to those used for determination of a stay of a preliminary injunction pending appeal, see *In re Wymer*, 5 B.R. 806 (B.A.P. 9<sup>th</sup> Cir. 1980) (adopting the standard for discretionary stays of a preliminary injunction under the predecessor to Rule 8005), the practical application of these four factors in a case arising under the Bankruptcy Code is very different. In the context of a stay pending *injunction* under Rule 62(c), courts often apply several alternative formulations of this traditional test in a "sliding scale" fashion, with the strength of any one factor varying inversely with the strength of the remaining factors. See, e.g., *Lopez v. Heckler*, 713 F.2d 1432 (9<sup>th</sup> Cir. 1983, *rev'd on other grounds*, 469 US. 1082 (1984)).<sup>2</sup>

<sup>2</sup> The Ninth Circuit, for example uses at least three "alternative" tests of this type. For example, to prevail the moving party must show either (1) "a strong likelihood of success on the merits" and "the possibility of irreparable injury to plaintiff if preliminary relief is not granted" or (2) "that serious legal questions are raised and that the balance of hardships tips sharply in its favor." *Golden Gate Restaurant Ass'n. v. City of San Francisco*, 512 F.3d 1112, 1116 (9<sup>th</sup> Cir. 2008) (quoting *Natural Res. Def. Council, Inc. v. Winter*, 502 F.3d 859, 862 (9<sup>th</sup> Cir. 2007); *Lopez v. Heckler*, 713 F.2d at 1435. Under the second alternative, the legal questions must be so "serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberate investigation." *County of Alameda v. Weinberger*, 520 F.2d 344, 1975 U.S. App. LEXIS 14117, 349 n.12 (9<sup>th</sup> Cir.1975).

1 Courts of this circuit, as well as those of other circuits, generally agree that under Rule 8005  
2 a sliding scale formulation is not appropriate for use in making the determination of whether a stay  
3 should be granted pending the appeal of a bankruptcy court order. *See Rose Townsend Trust v.*  
4 *Johnston (In re Johnston)*, No. 06-80040, 2007 WL 2684736 (Bankr. E.D. Wash. Sept. 7, 2007)  
5 (rejecting the movants' citations to cases, such as *Lopez v. Heckler*, 713 F.2d 1432, that did not rely  
6 upon F.R.B.P. 8005); compare *In re Forty-Eight Insulations, Inc.*, 115 F.3d 1294, 1301 (7<sup>th</sup> Cir.  
7 1997) (stating that if the movant failed to make the requisite threshold showings of both a strong  
8 likelihood of success on the merits and irreparable harm, the stay should be denied without further  
9 analysis). The reason for the rejection of the standard sliding scale analysis under Fed. R. Bankr.  
10 Proc. 8005 relates to the procedural posture of an appeal, *i.e.*, whether it is from a final order of a  
11 bankruptcy court on the merits; or from a preliminary determination, not on the merits. *See, e.g.*,  
12 *Dynamic Finance Corp. v. Kipperman (In re North Plaza, LLC)*, Case No. 08-CV-1194, Order  
13 Denying Appellants' Motion for Stay Pending Appeal (S.D. Cal. July 25, 2008) (Whelan, J.)<sup>3</sup>:

14 A "sliding scale" approach, which often results in disproportionately  
15 weighting the "irreparable harm" prong, is appropriate for preliminary  
16 injunctions because a court deals with the dispute on first impressions,  
17 relies on a less-than-developed factual and legal record, and will  
ultimately revisit the issue down the road. In contrast, where-as here-a  
court has taken extensive evidence and briefing and issued a  
determination on the merits, an interest in finality arises.

18 Under Rule 8005, therefore, the substantial weight of authority in the Ninth Circuit requires  
19 that, each element of the test must be proved by the moving party by a preponderance of the  
20 evidence. *See, e.g., Silicon Valley Bank v. Pon (In re Pon)*, 1994 U.S. Dist. LEXIS 2559 at \* 6  
21 (LEXIS Citation only) (N.D. Cal. Feb. 25, 1994) (citing *In re Dial Industries, Inc.*, 137 Bankr. 247,  
22 250-251 (Bankr. N.D. Ohio 1992)) [cited in LEXIS only]. The Diaz Defendants' statement that "if  
23 the court disagrees that they cannot satisfy the 'likelihood of success' prong [they] can make such a  
24 strong showing on the other factors that the Court should grant this motion," [Motion at 9], is error.  
25 *See Thomas v. City of Evanston*, 636 F.Supp. 587, 590-91 (An appellant's failure to meet their  
26

27 <sup>3</sup> The Opinion is attached as Exhibit "A" hereto. *See* Fed. R. App. Proc. 32.1; 9<sup>th</sup> Cir. Rule 36-3  
28 (providing for citation to unpublished dispositions and orders issued on or after January 1, 2007).

1 burden of persuasion regarding even one of these factors requires denial of the stay);<sup>4</sup> *see also, e.g.,*  
2 *Ohanian v. Irwin (In re Irwin)*, 338 B.R. AT 839; *Yeganeh v. Sims*, 2006 WL 1310447 (N.D. Cal.  
3 May 12, 2006) at \*19 (failure to prove likelihood of success on the merits alone is grounds for denial  
4 of the stay); *In re Forty-Eight Insulations, Inc.*, 115 F.3d at 1301 (same, cited by the Diaz  
5 Defendants).

6 **B. The Diaz Defendants Cannot Demonstrate Any Probability of Success on the Merits**

7 The likelihood of success on the merits is a threshold issue, normally "the most important"  
8 factor in the determination of whether a stay may be granted. *United States v. Fitzgerald*, 884 F.  
9 Supp. 376, 377 (D. Idaho 1995) (citing *Garcia-Mir v. Meese*, 781 F.2d 1450, 1453 (11th Cir. 1986)).  
10 Indeed, "[t]he sine qua non of the stay pending appeal standard is whether the movants are likely to  
11 succeed on the merits." Wright, Miller & Kane, Federal Practice and Procedure: 16A Jurisdiction 3d  
12 § 3954 & n.10.1 (West Supp. April 2008) (quoting *Acevedo-Garcia v. Veta Monroig*, 296 F.3d 13,  
13 16 (1<sup>st</sup> Cir. 2002)).

14 A movant seeking a stay pending review on the merits of a final judgment will necessarily  
15 have greater difficulty in demonstrating a likelihood of success on the merits. "In essence, a party  
16 seeking a stay must ordinarily demonstrate to a reviewing court that there is a likelihood of  
17 reversal." *Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150 (6th  
18 Cir. Mich. 1991); *see also, e.g., In re Forty-Eight Insulations, Inc.*, 115 F.3d 1294, 1301 (7<sup>th</sup> Cir.  
19 1997) (describing the required showing as a "strong" and "substantial" likelihood of success, and  
20 stating, "in the context of a stay pending appeal, where the applicant's arguments have already been  
21 evaluated on the success scale, the applicant must make a stronger threshold showing of likelihood  
22 of success to meet his burden.").

23 The requisite showing for "likelihood of success" requires, at an absolute minimum, that the  
24 movant raise "'questions going to the merits so *serious, substantial, difficult and doubtful* as to make  
25 them a fair ground for litigation and thus for more deliberate inquiry.'" *County of Alameda v.*  
26

27 <sup>4</sup> Although these required elements may be "balanced," the threshold preponderance burden  
28 obviously does not leave as much "play" in the machinery as does the more liberal "sliding scale"  
approach used in the determination of a stay of a preliminary injunction.

1 *Weinberger*, 520 F.2d 344, 349 n.12 (9th Cir.1975) (citations omitted) (emphasis added). Stated a  
2 different way, at this procedural juncture—after numerous dispositive motions and where the Court  
3 has conducted a five-day trial on the merits—in order to satisfy this prong of the test, the Court  
4 would have to find that there is a substantial possibility that it had based its decision on an erroneous  
5 view of the law or clearly erroneous factual findings, or that it made a clear error of judgment in the  
6 Amended Judgment. Cases cited by the Diaz Defendants for a contrary position, such as  
7 *Mohammed v. Reno*, 309 F.3d 95, 101 (2d Cir. 2002) (stay of deportation) and *LaRouche v. Kezer*,  
8 20 F.3d 68, 72-23 (2d Cir. 1994) (stay of preliminary injunction) concern the standard for  
9 preliminary injunctive relief on appeal and do concern final judgments on the merits, nor do they  
10 apply Rule 8005. The other case cited by the Diaz Defendants, *In re Forty Eight Insulations, Inc.*,  
11 115 F.3d at 1301, as discussed above, absolutely requires a threshold showing of “strong” and  
12 “substantial” showing of likelihood of success, not merely a “possibility,” as suggested by the Diaz  
13 Defendants. Here, the minimal showing on the merits has not been made—and cannot be made  
14 under any circumstances.

15 Here, the Diaz Defendants base the merit of their appeal on three discrete issues: (i) that the  
16 Court lacked subject matter jurisdiction over the proceeding; (ii) that the “avoidance” provisions of  
17 the Bankruptcy Code do not apply extraterritorially; and (iii) that comity considerations dictate the  
18 use of Mexican law. Each of these contentions merely resurrects arguments that have been  
19 thoroughly discredited in the prior proceedings in this Court and may thus be disposed of in  
20 summary fashion.

21 **1. The Court Has Subject Matter Jurisdiction Over the Adversary Proceedings**

22 There is no validity to the Diaz Defendants’ contention that the Court has no subject matter  
23 jurisdiction over these proceedings. As stated in the Amended Judgment, the Court “has subject  
24 matter jurisdiction over claims to avoid and recover the wrongful transfer of the Debtor’s interest in  
25 the fideicomiso trust, and it has *in personam* jurisdiction over each of the Defendants in these actions  
26 to order them to execute the necessary conveyance documents to return the Villa Property to the  
27 estate, subject to enforcement through this Court’s contempt powers, even though it indirectly  
28 affects title to real property in Mexico.” [Amended Judgment at 33. (citing, *inter alia*, *Fall v. Eastin*,

1 215 U.S. 1, 9-12 (1909)].

2 *Fall v. Eastin* holds that

3 [t]he territorial limitation of courts of a state over property in another  
4 state has a limited exception in the jurisdiction of a court of equity . . .  
5 A court of equity, having authority to act upon the person, may  
6 indirectly act upon real estate in another state, through the  
7 instrumentality of this authority over the person. Whatever it may do  
8 through the party, it may do to give effect to its decree respecting  
9 property, whether it goes to the entire disposition of [the property] or  
10 only to affect [the property] with liens or burdens.

11 *Id.*

12 Thus, although a court may not *directly* act on property which lies beyond its borders, it may  
13 *indirectly* act on such property by its assertion of *in personam* jurisdiction over the defendant. In  
14 accord with the established rule of *Fall v. Easton*, the Ninth Circuit has endorsed the use the  
15 contempt power to command a party over whom the court has personal jurisdiction to take all acts  
16 necessary to transfer Mexican real property into a fideicomiso trust where such is required to do  
17 equity. *See Brady v. Brown*, 51 F.3d 810 (9<sup>th</sup> Cir. 1995). *Brady* was a civil proceeding concerning  
18 substantially similar facts and with a strikingly similar equitable posture to these proceedings. *Id.*  
19 As such, the contention by the Diaz Defendants that this Court lacks subject matter jurisdiction over  
20 these proceedings where the Diaz Defendants have otherwise submitted to the personal jurisdiction  
21 of the Court lacks any colorable merit.

22 **2. The Recovery Pursuant to Section 550 Has No Extraterritorial Effect;**  
23 **Avoidance of a Post-Petition Transfer of Property of the Estate Under Section 549**  
24 **of the Bankruptcy Code Has Express Extraterritorial Application**

25 Congress has the authority to apply its laws extraterritorially, provided, however, that there is  
26 a presumption against such application. In *E.E.O.C. v. Arabian American Oil Co.*, 499 U.S. 244  
27 (1991), the Supreme Court held that "legislation of Congress . . . is meant to apply only within the  
28 territorial jurisdiction of the United States . . . unless a contrary intent appears."

29 A two-fold inquiry is required when attempting to determine if this presumption against  
30 extraterritoriality should be given effect. First, a court must determine if the presumption applies at  
31 all, *i.e.*, the court must make findings on whether the conduct occurred outside the borders of the  
32 United States. *Gushi Bros. Co. v. Bank of Guam*, 28 F.3d 1535, 1538-39 (9<sup>th</sup> Cir. 1994). In

11

1 conducting this inquiry, the court will look to the specific conduct proscribed by the particular  
2 legislation as well as to the impact of the conduct within the United States. *Id.* Second, if the  
3 presumption is implicated, that is, if the conduct substantially occurred outside the borders of the  
4 United States, only then is it necessary to inquire whether Congress intended the statute to extend to  
5 extraterritorial conduct. In conducting this inquiry into legislative intent, a court should look to "all  
6 available evidence," including the text of the statute, the overall statutory scheme, legislative reports,  
7 and any other indicia of congressional intent. *Id.*

8 The presumption against extraterritoriality is not implicated by the avoidance of the  
9 fraudulent conveyance from Jerry Icenhower to Howell and Gardner, Investors, Inc. that was ordered  
10 pursuant to the Amended Judgment in the Adversary Proceeding No. 04-90392. Here, the center of  
11 gravity of the correct transfer (between debtor & H&G), is indisputably within the U.S.

12 Furthermore, with respect to the avoidance of the post-petition transfer to the Diaz  
13 Defendants under Adversary Proceeding 06-90369, pursuant to 28 U.S.C. §§ 157(a) and 1334(d),  
14 this Court has exclusive jurisdiction over "all of the property, wherever located, of the debtor as of  
15 the commencement of such case, and of property of the estate." 28 U.S.C. § 1334(d) (emphasis  
16 added). Furthermore, under 11 U.S.C. § 541(a), property of the estate is defined to include property  
17 "wherever located and by whomever held." As a result of the Court's Amended Judgment granting  
18 substantive consolidation of Howell & Gardner *nunc pro tunc*, the Villa Property is "property of the  
19 estate," over which Congress has clearly granted clear broad jurisdiction to this Court, along with  
20 express extraterritorial reach, pursuant to the unequivocal words of the statute.

21 **3. There Are No Facts Suggesting Comity Should Have Been Applied**

22 As stated by the Diaz Defendants, a court's decision to extend or deny comity is reviewed for  
23 abuse of discretion. *See Allstate Life Ins. Co. v. Linter Group Ltd.*, 994 F.2d 996, 999 2d (cir. 1993).  
24 No abuse of discretion can be shown here.

25 International comity is "the recognition which one nation allows within its territory to the  
26 legislative, executive or judicial acts of another nation, having due regard both to international duty  
27 and convenience, and to the rights of its own citizens or of other persons who are under the  
28 protection of its laws." *Hilton v. Guyot*, 159 U.S. 113, 164, 16 S. Ct. 139, 40 L. Ed. 95 (1895).

1 ///

2 Comity is a discretionary refusal to exercise jurisdiction on the part of a court where the case  
3 is more properly adjudicated in a foreign state. *Maxwell Commc'n Corp. PLC v. Societe Generale*  
4 *PLC (In re Maxwell Commc'n Corp.)*, 93 F.3d 1036, 1047 (2d Cir. 1996).. In deciding whether to  
5 forego application of our own law under the doctrine of international comity, the Supreme Court has  
6 referred to the factors in Restatement (Third) of Foreign Relations Law § 403 (1987). *See Hartford*  
7 *Fire Ins.*, 509 U.S. at 799 & n. 25; *id.* at 818 (Scalia, J., dissenting); *see also In re Maxwell Commc'n*  
8 *Corp.*, 93 F.3d at 1047-48. The Restatement looks to, *inter alia*, (i) "the extent to which the activity  
9 takes place within the territory" of the regulating state; (ii) "the connections, such as nationality,  
10 residence, or economic activity, between the regulating state and the person principally responsible  
11 for the activity to be regulated;" (iii) "the extent to which other states regulate such activities" or  
12 "may have an interest in regulating [them];" (iv) the "likelihood of conflict with regulation by  
13 another state," and (v) "the importance of regulation to the regulating state." Restatement (Third) of  
14 Foreign Relations Law, § 403(2).

15 Here, the United States unquestionably has a stronger interest than Mexico in regulating the  
16 transaction between Howell & Gardner Investors, Inc./Icenhower and the Diaz Defendants. A key  
17 purpose of the Bankruptcy Code is to protect the rights of both debtors and creditors during  
18 insolvency. In exchange, the Bankruptcy Code's avoidance provisions protect creditors by  
19 preserving the bankruptcy estate against illegitimate depletions. *In re Hargis*, 887 F.2d 77, 79 (5th  
20 Cir.1989). The United States has a strong interest in extending these personal protections to its  
21 residents. Mexico, by contrast, has comparatively little interest in protecting the Diaz Defendants,  
22 who are residents of the United States. *Cf. Hurtado v. Superior Court*, 11 Cal. 3d 574, 522 P.2d 666,  
23 670, 114 Cal. Rptr. 106 (Cal. 1974) (holding that Mexico has no interest in applying its statutory  
24 limitation on damages when defendants in a tort action were not Mexican residents).

25 Under these facts, the question is not even close. Here, substantially all of the activity  
26 surrounding the transfer took place in the United States. Diaz and Icenhower first met in the United  
27 States. Communications between them concerning the transaction took place in the United States.  
28 All of the transfer documents were signed in the United States at the San Diego offices of Peter

1 Thompson, an attorney licensed by the California Bar. The documents were notarized by a  
2 California notary public. Moreover, almost all of the parties with an interest in this litigation,  
3 Kismet, the Debtors, the Diaz Defendants, Howell & Gardner Investors, Inc., and Craig Kelley—  
4 have a domicile or residence in the United States. The “fideicomiso” interest held by Howell &  
5 Gardner Investors, Inc./Icenhower was itself “in realiry a U.S. real estate irrevocable trust contract.”  
6 Jorge A. Vargas, *Acquisition of Real Estate In Mexico by U.S. Citizens and American Companies*  
7 (March 2007) at 14, available at <http://ssrn.com/abstract=968794> (emphasis added). The center of  
8 gravity of the transaction was the United States. There is thus no danger that the avoidance law of  
9 the regulating state—the United States—will conflict with Mexican law.

10 Furthermore, even in a case where the substantial activity takes place in a foreign  
11 jurisdiction, comity considerations are typically rejected where there is no persuasive argument “that  
12 there would be problems enforcing a judgment . . . , or that there are any substantial conflicts with  
13 Mexican law.” *Brady*, 51 F.3d at 819. In this respect, the enforcement here will be accomplished  
14 through the contempt power of the Court over the Diaz Defendants, over which the Court has  
15 personal jurisdiction. In addition, the remedy devised by the Court is essentially a “fideicomiso,”  
16 authorized by Article 18 of the 1973 Mexican foreign investment law. “Such an arrangement . . .  
17 does not violate Mexican law.” 51 F.3d at 819.

18 Most important, comity considerations are substantially negated where, as here, the issue  
19 concerns property of the estate fraudulently transferred post-petition. Under 28 U.S.C. § 1334(e),  
20 the bankruptcy court obtains exclusive *in rem* jurisdiction over all of the property of the estate. As  
21 such, the court exercises “custody” over such property, creating a legal fiction “that the property—  
22 regardless of actual location—is legally located within the jurisdictional boundaries of the district in  
23 which the court sits.” *Hong Kong & Shanghai Banking Corp. v. Simon (In re Simon)*, 153 F.3d 991  
24 (9<sup>th</sup> Cir. 1998). As such, in determining comity in bankruptcy cases “the court will defer to where  
25 the ‘center of gravity’ of multiple proceedings exists. *Id.* Where there is no competing proceeding  
26 in a foreign nation at issue, the court most properly utilizes its discretion to assert its jurisdiction  
27 over property of the estate is at issue. *Id.* To fail to do so in derogation of creditors’ interests would  
28 be quite extraordinary.

1 ///

2 The Diaz Defendants otherwise attempt to suggest that the dispute should have been litigated  
3 in Mexico due to the so-called "Calvo Clause." This issue, which the Diaz Defendants seek to  
4 sweep with a broad brush into their discussion of comity, instead relates to the affirmative defense of  
5 improper venue. As revealed by the text of Article 27 of the Mexican Constitution quoted by the  
6 Diaz Defendants [Motion at 18] the "Calvo Clause" is strictly a matter of contract. As such, it is not  
7 self-executing, but contemplates that the parties will enter into an "agreement" for venue concerning  
8 disputes, that is, a standard forum selection clause to be contained in the "escritura." In this respect,  
9 the Diaz Defendants have previously waived any affirmative defense of improper venue based upon  
10 any forum selection clause in the escritura, which the Court found to be permissive in nature. As  
11 such, the Court's Order dated March 6, 2008 [Docket Entry No. 159] completely disposed of this  
12 issue.

13 C. The Diaz Defendants' Claims of Irreparable Harm are of No Consequence

14 The Diaz Defendants appear to concede the general lack of merit of their appeal and  
15 otherwise seek to convince the Court that a stay should still be granted because of the "irreparable  
16 harm" that would come to them should Kismet execute on the Amended Judgment. This argument  
17 is not supportable. A discretionary stay may not be granted absent a threshold strong showing of  
18 likely success on the merits, regardless of any showing on the Diaz Defendants' part of irreparable  
19 harm. See, e.g., *Blankenship v. Boyle*, 447 F.2d 1280 (D.D.C. 1971); cf. *Gagan v. Sharer*, 2005  
20 U.S. Dist. LEXIS 27409 (D. Ariz. Nov. 1, 2005)<sup>5</sup> [cited in LEXIS only].

21 The Diaz Defendants attempt to base their claims of irreparable harm on the fact that a *per se*  
22 showing is met where "real property is involved." [Motion at 21.] None of the cases cited by the  
23 Diaz Defendants provide persuasive support for this principle. The court in *In re Issa Corp.*, 142  
24 Bankr. 75, 78 (Bankr. S.D.N.Y. 1992) only stated that the debtor would "indisputably" suffer  
25 irreparable harm because the stay motion went unopposed. Neither *O'Hagan v. U.S.*, 86 F.3d 776,

26 <sup>5</sup> In this respect, the Diaz Defendants would not be able to obtain a stay even under the "alternative"  
27 formulations used in determining a stay upon injunction under which "it must be shown as an  
28 irreducible minimum that there is a *fair chance* of success on the merits," even if the balance of  
harm tips sharply in their favor. 2 Matthew Bender Practice Guide, Federal Pretrial Civil Procedure  
in California § 19.08[3][d] (emphasis added). 15

1 783 (8<sup>th</sup> Cir. 1996), nor *Goldies Bookstore, Inc. v. Superior Court*, 739 F.2d 466, dealt with a  
2 discretionary stay under Rule 62(a). As such, they are inapposite. The courts of the Ninth Circuit  
3 have generally dismissed similar arguments as having only "superficial" appeal. See, e.g., *Acian v.*  
4 *Fullmer (In re Fullmer)*, 323 B.R. 287, 305 (Bankr. D. Nev. 2005). Other courts have recognized  
5 that in fact there is actually no "irreparable" harm because, upon any reversal, the Appellee would  
6 return the property. See *In re Krause*, 2007 Bankr. LEXIS 3049 at \*11.

7 Furthermore, absent the requisite proof of success on the merits, irreparable harm—no matter  
8 how strenuously it is contended—is otherwise irrelevant. A stay under such circumstances would  
9 only result in unnecessary delay of the execution of the Bankruptcy Court's lawful order, with no  
10 countervailing societal benefit. As stated above, a moving party's failure to establish success on the  
11 merits is reason for denial of a stay, and any irreparable harm that the Diaz Defendants may  
12 demonstrate is nullified by their failure to raise a colorable case for appeal on the merits.

13 To the extent that the Diaz Defendants' irreparable harm argument is based on a contention  
14 that that, absent a stay, the appeal will become moot, this also fails. The majority of cases that have  
15 considered the issue have determined that the risk that an appeal would become moot does not, by  
16 itself, constitute irreparable harm. *Id.* at 304 (collecting cases). *In re Adelpia Communications*  
17 *Corp.*, 361 B.R. 337, 347-48 (S.D.N.Y. 2007), does not hold that mootness alone constitutes  
18 irreparable harm. Rather, irreparable harm is shown only where "any appeal of significant claims of  
19 error" is absolutely foreclosed. *Id.* at 348 (emphasis in original). As set forth above, the Diaz  
20 Defendants have not demonstrated that they can raise "significant claims of error" on appeal.

21 On the other hand, the Diaz Defendants must also show that the bankruptcy estate and  
22 Kismet would not be harmed by a stay. *Yeganeh v. Sims (In re Yeganeh)*, 2006 U.S. Dist. LEXIS  
23 32765 (N.D. Cal. May 12, 2006). Here, the Diaz Defendants (focusing on the harm to come to  
24 themselves from enforcement of the Order) have not met this burden. In characterizing the harm to  
25 Kismet as negligible to nonexistent, the Diaz Defendants ignore the very real burdens that delay in  
26 the execution of the Amended Judgment will place on Kismet. The delay in the transfer of the Villa  
27 Property will have a significant impact on Kismet in terms of lost opportunities, for development and  
28 otherwise, which cannot be compensated for by money. Furthermore, the Villa Property is property

1 of the estate, which was wrongfully transferred to the Diaz Defendants post-petition. The estate has  
2 been wrongfully deprived of this asset (and its rents and other income) for approximately four years.  
3 Furthermore, the estate received none of the consideration for the transfer of the Villa Property to  
4 the Diaz Defendants. In such circumstances, further delay is unwarranted and would not serve the  
5 interests of justice.

6 **D. The Public Interest Does Not Militate in the Diaz Defendants' Favor**

7 This is not a case "affecting the public interest." Although a Bankruptcy Case is an *in rem*  
8 proceeding and thus affects the rights of the public in general to the "res" constituting the  
9 bankruptcy estate, there is not a public right at stake in the traditional sense used under the four  
10 factor test, such as a constitutional issue or other right affecting the public at large. As such, this  
11 factor need not be specifically added into the equitable determination regarding the granting of the  
12 stay.

13 In the end analysis, however, larger policy considerations are necessarily a factor in the  
14 determination of any motion requesting a stay of an order of a bankruptcy court in a case arising  
15 under the Bankruptcy Code. A longstanding core policy of the Bankruptcy Code is to provide a  
16 cost-effective and speedy process to minimize the cost to creditors. Thus, Rule 8005, along with all  
17 the other Fed. Rules Bankr. Proc., need to be construed in light of this overriding policy goal. Rule  
18 1001 states: "These rules shall be construed to secure the just, speedy, and inexpensive  
19 determination of every case and proceeding." The result of any stay in this proceeding would be to  
20 allow *property of the estate* to remain in the hands of a wrongful possessor. In light of the very thin  
21 meritorious reed upon which their Motion hinges, the policy of the Bankruptcy Code militates  
22 against granting the Diaz Defendants' Emergency Stay Motion.

23 ///

24 ///

25 ///

26 ///

27 ///

28 ///

1 ///

2

#### IV. CONCLUSION

3

4

For each of the reasons set forth herein, Kismet respectfully requests that the Court deny the  
Diaz Defendants Emergency Motion for Stay Pending Appeal.

5

6

Dated: August 7, 2008

BAKER & MCKENZIE LLP

7

8

By: /s/ Ali M.M. Mojdehi

9

Ali M.M. Mojdehi  
Janet D. Gertz

10

11

Attorneys for Plaintiff  
Kismet Acquisition, LLC, a Delaware  
limited liability company

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

**EXHIBIT "C"**

1 Ali M.M. Mojdehi, State Bar No. 123846  
2 Janet D. Gertz, State Bar No. 231172  
3 **BAKER & McKENZIE LLP**  
4 12544 High Bluff Drive, Third Floor  
5 San Diego, CA 92130-3051  
6 Telephone: +1 858-523-6200

7  
8 Attorneys for Plaintiff  
9 KISMET ACQUISITION, LLC  
10

11 UNITED STATES BANKRUPTCY COURT  
12 SOUTHERN DISTRICT OF CALIFORNIA  
13

14 In re  
15 JERRY LEE ICENHOWER dba Seaview  
16 Properties, and DONNA LEE ICENHOWER,  
17 Debtors.  
18

19 KISMET ACQUISITION, LLC,  
20 Plaintiff,  
21 v.  
22

23 JERRY L. ICENHOWER an individual; et al.  
24 Defendants.  
25

Case No. 03-11155-LA-7

Chapter Number 7

Adv. Proc. No: 04-90392  
Adv. Proc. No. 06-90369

**ELECTION BY APPELLEE KISMET  
ACQUISITION, LLC, TO HAVE  
APPEAL HEARD BY DISTRICT  
COURT**

DATE: N/A  
TIME N/A  
DEPT: 2  
JUDGE: Hon. Louise DeCarl Adler

26 Plaintiff and Appellee, Kismet Acquisition LLC ("Kismet"), respectfully elects pursuant to  
27 28 U.S.C. §158(c)(1)(B) to have the Diaz Defendants' appeal taken from the Amended Consolidated  
28 Judgment entered July 30, 2008 in the above adversary proceedings heard by the United States  
District Court, Southern District of California.

29 ///  
30 ///  
31 ///  
32 ///

1 Respectfully submitted,

2  
3 Dated: August 7, 2008

BAKER & MCKENZIE LLP

4  
5 By: /s/ Ali M.M. Mojdehi

6 Ali M.M. Mojdehi  
7 Janet D. Gertz

8 Attorneys for Plaintiff  
9 Kismet Acquisition, LLC, a Delaware  
10 limited liability company  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

# FAX RX Result Report



MFP

KM-5050

Firmware Version 2GR\_2000.013.009 2007.09.03

Job No. : 006829 Total Time : 0'07'11" Page : 038

## Completed

Document : doc20080808115437

No.	Date and Time	Destination	Times	Type	Result	Resolution / ECM
001	08/08/2008 11:54		0'07'11"	FAX	OK	200x100 Normal / On
002	08/08/2008 11:54	bapca09filings@ca9.uscourts.gov	0'00'00"	E-mail	OK	200x100 Normal / -

## CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

## I. (a) PLAINTIFFS

Kismet Acquisition, LLC

(b) County of Residence of First Listed Plaintiff \_\_\_\_\_  
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorney's (Firm Name, Address, and Telephone Number)

Ali M.M. Mojdehi  
13544 High Bluff Drive, Third Floor  
San Diego, CA 92130  
(858)523-6200

## DEFENDANTS

Jerry L Icenhower

08 AUG -8 PM 12:02

County of Residence of First Listed Defendant

(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE  
LAND INVOLVED.

Attorneys (If Known)

DEPUTY

08 CV 1446 BTM BLM

## II. BASIS OF JURISDICTION

(Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff ☒ 3 Federal Question (U.S. Government Not a Party)
- ☐ 2 U.S. Government Defendant ☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

## III. CITIZENSHIP OF PRINCIPAL PARTIES

(For Diversity Cases Only)

(Place an "X" in One Box for Plaintiff and One Box for Defendant)

- |   | PTF                        | DEF                        |   | PTF                        | DEF                        |
|---|----------------------------|----------------------------|---|----------------------------|----------------------------|
| Citizen of This State                   | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State     | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State                | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation  | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

## IV. NATURE OF SUIT

(Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	<b>PERSONAL INJURY</b> <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <b>PERSONAL INJURY</b> <input type="checkbox"/> 362 Personal Injury - Med. Malpractice <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability <b>PERSONAL PROPERTY</b> <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs. <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other <b>LABOR</b> <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act <b>IMMIGRATION</b> <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 463 Habeas Corpus - Alien Detainee <input type="checkbox"/> 465 Other Immigration Actions	<input checked="" type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 <b>PROPERTY RIGHTS</b> <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark <b>SOCIAL SECURITY</b> <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) <b>FEDERAL TAX SUITS</b> <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Information Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes
<b>REAL PROPERTY</b> <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	<b>CIVIL RIGHTS</b> <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 440 Other Civil Rights	<b>PRISONER PETITIONS</b> <input type="checkbox"/> 510 Motions to Vacate Sentence <b>Habeas Corpus:</b> <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition		

## V. ORIGIN

(Place an "X" in One Box Only)

- ☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from another district (specify) ☐ 6 Multidistrict Litigation ☐ 7 Appeal to District Judge from Magistrate Judgment

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):

28 USC 158

Brief description of cause:

## VI. CAUSE OF ACTION

## VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

DEMAND \$

CHECK YES only if demanded in complaint:

JURY DEMAND: ☐ Yes ☐ No

## VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE

DOCKET NUMBER

DATE

8/08/08

SIGNATURE OF ATTORNEY OF RECORD



FOR OFFICE USE ONLY

RECEIPT #

AMOUNT

APPLYING IFP

JUDGE

MAG. JUDGE

**UNITED STATES DISTRICT COURT**

Southern District Of California  
Office Of The Clerk  
880 Front Street, Room 4290  
San Diego, California 92101-8900  
Phone: (619) 557-5600  
Fax: (619) 702-9900

W. Samuel Hamrick, Jr.  
Clerk of Court

August 11, 2008

Jerry L Icenhower  
684 Margarita Ave.  
Coronado, CA 92118

Donna L. Icenhower  
684 Margarita Ave.  
Coronado, CA 92118

Ronald White  
762 W. El Segundo Blvd.  
Gardena, CA 90247

RE: Kismet Acquisition, LLC v. Icenhower et al  
Bankruptcy Case Number: 03-11155-LA-7  
BAP Case Number: SC-08-1198

You are hereby notified that the above entitled case was on August 8, 2008 transferred from the United States Bankruptcy Court, Southern District of California to the U.S. District Court, Southern District of California. The case will now contain the case number of the Southern District, and the initial of the assigned Judge. The case has been assigned to the Honorable Barry Ted Moskowitz, and on all future filings please show the case number as 08cv1446-BTM-BLM.

Sincerely yours,

W. Samuel Hamrick, Jr.  
Clerk of Court

By: \_\_\_\_\_  
C. Ecija, Deputy Clerk

cc: Bankruptcy Court